IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO. 2237 OF 2001

1. M/s.BASF (India) Limited.

2. Mr.P.A.Ramasamy. ... Petitioners.

V/s.

1. Shri W.Hasan,
   Commissioner of Income Tax,
   Mumbai city I, Mumbai,
   having his office at Aayakar
   Bhavan, M.K.Road, Mumbai- 20.

2. Shri Sanjeev Sharma,
   Deputy CIT, TDS Circle I,
   having his officer at Aayakar
   Bhavan, M.K.Road, Mumbai- 20.

3. Union of India,
   Aayakar Bhavan, New Marine
   Lines, Mumbai- 400 020.

4. BASF AG. Germany,
   C/o. Sharp & Tannan,
   Bank ofl Baroda Building,
   Bombay Samachar Marg,
   Mumbai- 400 001.

5. Central Board of Direct Taxes,
   North Block,
   New Delhi- 110 001. ... Respondents.

A.K.Jasani i/b. T.Pooran & Co.
for the petitioners.

Parag Vyas for the respondents.

CORAM : V.C.DAGA AND J.P.DEVADHAR, JJ.

RESERVED ON : 18th October 2005.

PRONOUNCED ON : 28th October 2005.

JUDGMENT : (Per V.C.Daga,J.)

. This petition is directed against the order dated 28th February, 2001 passed under section 264 of the Income Tax Act, 1961 ("Act" for short) by the Commissioner of Income Tax, Mumbai City-I, Mumbai rejecting the revision petition filed by the assessee and thereby confirming the order passed by the assessing officer dated 14th July, 2000 rejecting application for refund of tax deducted at source ("TDS" for short).

The Facts :
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2. The facts giving rise to the present petition, in nutshell, are as under :

3. The BSF (India) Ltd. ('the assessee' for short) had entered into a collaboration agreement with M/s.BASF AG. Germany on 16th July, 1996 for increasing the capacity of its existing plant for manufacturing Expandable Styrene Monomer from 3,576 metric tones to at least 73,000 metric tones and also for obtaining the improvements/developments made by the collaborator relating to the actual

process, methods, technical information and know-how for the manufacture and sale of expandable sytrene polymers. In consideration of the above, amongst others, in terms of Article 3.1 of the collaboration agreement, BASF India Limited, the assessee was required to pay a running royalty @ 2% on the domestic net sale price of the agreement product manufactured in excess of the capacity of 3,576 metric tones after the date of the start up. The royalty was payable within 60 days from end of 30th June and 31st December of each calendar year during the currency of the agreement. For the period from 1st January, 1999 to 30th June, 1999 the royalty was remitted and tax of Rs.2,73,242 was deducted and claimed to have been deposited on 17th August,. 1999. Thereafter, the assessee realised that during the period the production was not in excess as contemplated in the contract and, therefore, claimed refund of the royalty which was, subsequently, received the month of in January, 2000. The assessee, therefore, had sought refund of the TDS amount of Rs.2,73,242/- paid by it.

4. The assessing officer vide his order dated 14th July, 2000 rejected the application for refund of tax deducted at source in view of the Circular No.790 dated 20th April, 2000.

5. Being aggrieved by the aforesaid order dated 14th July, 2000 passed by the assessing officer; rejecting application for refund, the petitioners filed a revision application before the Commissioner of Income Tax on 8th September, 2000 which also came to be rejected by another order dated 28th February, 2001 in view of No.790 dated 20th April, 2000.

6. Being aggrieved by the aforesaid order, the petitioners have invoked writ jurisdiction of this Court under Article 226 of the Constitution of India.

7. After hearings the petitioners, 'Rule' was issued. The petition was set for final hearing. Today, when the petition is taken up for final hearing, since there was no counter affidavit the Revenue was asked whether they would like to put in their affidavit-in-reply. Mr.Parag Vyas, Advocate, appearing for the respondents - Revenue stated that the petition can be heard without there being any counter affidavit on behalf of the Revenue. That is how, the petition was taken up for final hearing without any counter affidavit or return on behalf of the respondents.

Submissions :
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8. Mr.Jasani, learned counsel petitioners submits that the petitioners have wrongly paid the amount of royalty for the period from 1st January, 1999 to 30th June, 1999 after deducting therefrom tax at source in sum of Rs.2,73,242/-. He submits that the royalty was refunded to the petitioners on 18th January, 2000 since it was found to be not payable.

9. On 6th February, 2000, petitioners made application to the assessing officer seeking to adjust or refund of tax deducted at source on the amount of royalty. The details called for in this regard were furnished by the petitioners on 16th February, 2000 to the assessing officer. At the relevant time, No.769 dated 6th August, 1998 was in force and operation. Mr.Jasani submits that in view of the said , the petitioners were entitled to refund of tax deducted at source on the amount of royalty wrongly paid to the foreign collaborator, which was remitted back by the collaborator to the petitioners.

10. Mr.Jasani further submits that No.790 dated 20th April, 2000 revoking the earlier No.769 with immediate effect i.e. from

20th April, 2000 will have a prospective effect. He submits that No.790 dated 20th April, 2000 would apply to the applications for refund which were made after issuance of the said . He placed reliance on the judgment of this Court in **Unit Trust of India v. P.K.Unny**, (2001) 249 ITR 612 (Bom.); wherein it has been held that it is well settled that the withdrawal of the s cannot operate retrospectively since they are in the nature of instructions and/or guide-lines for the benefit of the department.

11. Mr.Jasani further submits that No.769 gave a right to the deductor of tax at source to claim refund in certain circumstances. According to him, to receive refund is a substantive right and, therefore, subsequent withdrawal of cannot prejudicially effect the substantive right of the petitioners to claim refund in accordance with the which was already in force at the time when the claim for refund was made by the petitioners. He placed reliance on the Full Bench judgment of the Kerala High Court in **C.I.T. v. B.M.Edward, India Sea Food, Cochin**, (1979) 119 ITR 334 (Ker.); wherein it was held that the assessee is entitled to get the benefit of the which was in force and operation at the relevant time; later withdrawal of the would not

prejudicially affect the rights of the assessee. He also placed reliance on the judgment of Andhra Pradesh High Court in **C.I.T. v. N.T.Ramarao (HUF)**, (1987) 163 ITR 453 (AP); wherein it was held that the s which were in force during the relevant assessment years were the s that had to be applied and subsequent s either withdrawing or modifying the earlier s could not have any application.

12. Mr.Jasani also pressed into service the judgment of the Apex Court in the case of **Gujarat Electricity Board v. Shantilal R.Desai**, AIR 1969 SC 239; wherein the only question for decision was: whether on the basis of notice issued by the Bombay State Electricity Board on 8th January, 1959 under section 7 of the Indian Electricity Act, 1910, prior to its amendment in 1959, the Gujarat Electricity Board could compulsorily purchase from the respondent therein the concern known as Bilumora Electric Power Supply Co. The Apex Court held that the Gujarat Electricity Board could do so as it was not the case of the respondent therein that either expressly or by necessary implication, the new law had taken away the right which was acquired earlier.

13. He further placed reliance on the judgment of this Court in the case of **Bakor Moti Pagi v.**

Ishwar Moti Thakkar, AIR 1935 Bom 257; wherein it was held that an amendment to the legislation during the currency of the suit is irrelevant and the rights of the parties are to be governed by the Act as it existed at the time when suit was filed or initiated. He, therefore, submits that the petitioners are entitled to refund of tax deducted at source.

14. Without prejudice to the above, Mr.Jasani, learned counsel for the petitioners submits that No.790 dated 20th April, 2000 does not disentitle the petitioners from claiming refund of tax deducted at source on the remittance wrongly made which was, ultimately, returned to the petitioners. According to him, the case of the petitioners is clearly covered by the spirit of clause (b) which deals with a case where the remittance is duly made though inadvertently and the collaborator agreeing that it was not entitled to the same and has returned the same to the petitioners. The Board has opined that where income does not accrue to the non-resident the tax deducted belongs to the deductor and the amount deposited to the credit of the Government cannot be said to be tax. In this view of the matter, he submits that in the present case at hand; there is no dispute that the income did not belong to the non-resident as

such the tax deducted at source belongs to the petitioners. In his submission, if the amount credited to the government cannot be said to be a tax, then the same cannot be retained by the Government. That the authority below, therefore, was not justified in rejecting the claim of refund made by the petitioners in view of No.790. According to him, the petitioners ought to have been granted refund as they were entitled to the same even under No.790 referred to hereinabove.

15. Without prejudice to the above, Mr.Jasani further submits that the Revenue has been granting refund in case the tax has been wrongly deducted at source even though there was no liability to do so. In his submission, the Central Board of Direct Tax ("C.B.D.T." for short) in its No.285 dated 21st October, 1980 had suggested that excess payment can be refunded, independent of the provisions of the Income Tax Act to the persons responsible for making such payment. He relied upon the judgment of the Apex Court in the case of I.T.O. v. Delhi Development Authority (DDA), (2001) ITR 972 (SC); wherein the DDA was found to have failed to deduct tax on the interest paid to the buyers for the period of delay in constructing and allotting flats and the sums were recovered under section 201(1) of the Act. The Tribunal later on held that the amount

credited to the accounts of the allottees was not in nature of interest within the meaning of section 2(28A) of the Act. The amount so recovered was, therefore, ordered to be refunded. The issue regarding interest thereon when came up before the Apex Court for consideration, the Apex Court granted interest under section 244(1A) and 244A of the Act. Mr.Jasani, therefore, submits that if an amount has been wrongly paid to the Government, such amount must be refunded to the person paying such amount.

16. Mr.Jasani further submits that, admittedly, the petitioners had under mistake remitted the royalty which was returned by the collaborator as such deductor is entitled to refund because it was not an amount paid by way of tax. . He placed reliance on the judgment of the Apex Court in the case of **C.S.T. v. Auraiya Chamber of Commerce**, (1987) 167 ITR 458; wherein it was held that if mistake of law or fact is established, then the assessee is entitled to recover the money and the party receiving is bound to return it irrespective of any other consideration. It further held that where, indisputably, the dealer had a legal title to get the money refunded and since the dealer was not guilty of any laches; and since there was no specific prohibition against refund, it was not proper to get entangled in the cobweb of

procedures to defeat substantial justice. He further relied upon the judgment of the Apex Court in **C.I.T. v. Shelly Products & Anr.**, (2003) 261 ITR 367 (SC); wherein the Apex Court held that in a case where an assessee chose to deposit by way of abundant caution advance tax or self assessment tax which was in excess of his liability; on the basis of the return furnished or there is any arithmetical error or inaccuracy, it is open to him to claim refund of the excess tax paid in the course of assessment proceeding. Similarly, if, he has by mistake or inadvertence or on account of ignorance, included in his income any amount which was exempted from payment of income-tax or was not a income within the contemplation of law, he may likewise bring it to the notice of the assessing authority, who, if satisfied, may grant appropriate relief.

17. Mr.Jasani further submits that it is well settled that no tax can be levied except with the authority of law as enjoined by Article 265 of the Constitution of India. The C.B.D.T. has opined in No.790 that the amount paid by the assessees like petitioners is not a tax and, therefore, the same cannot be retained by the respondents. He pressed into service judgment of this Court in **Nirmala L. Mehta v. A.Balasubramaniam, C.I.T.**, (2004) 269 ITR 1 (Bom);

wherein it was held that there could not be any estoppel, against the statute. Article 265 of the Constitution in unmistakable terms provides that no tax shall be levied or collected except by authority of law. Acquiescence cannot take away from a party the relief to which he is entitled to on account of levy or collection of tax is without any authority of law.

18. There is no dispute that the amount deposited by the petitioners is in excess of tax which could not be collected from the petitioners. C.B.D.T. in the context of section 192 of the Act in No.285 dated 28th October, 1980 had suggested grant of refund independent of the provisions of the Act. In this view of the matter, Mr.Jasani states that the petitioners could not have been denied refund sought by them.

19. Lastly, Mr.Jasani submits that there is no way the payee could have claimed the tax deducted at source and credited with the department inasmuch as no income had accrued to it as the remittance itself had ben returned to the payer and, consequently, a certificate of tax deducted at source could not have been issued by the petitioners. In his submission, equity, therefore, demands that the amount should be refunded to the deductor i.e. the petitioners.

Per Contra :
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20. Learned counsel for the Revenue submits that as per No.790 dated 20th April, 2000 (para-9), refund is not be issued to the deductor of tax in the cases referred to in clause (1)(c) of No.769 dated 6th August, 1998, which deals with a situation where the tax deducted at source is found to be in excess of the tax deductible for any reason other than cancellation of contract. He further submits that there is no provision under the Act to refund the amount to a person who is not an assessee or a deemed assessee. In his submission, Articles 265 and 300A of the Constitution are not violated as, at the time when the amount was paid by the petitioners, they themselves had considered it to be in the nature of income liable to deduction as tax. The subsequent events cannot affect the validity of the tax deducted at that time. He, relying upon the judgment of the Apex Court in the case of **Mafatlal Industries Ltd. v. Union of India**, 1997 (89) ELT 247 SC, submits that even otherwise a tax collected under misapplication or misinterpretation of provision of law cannot be said to be a case where Article 265 can be invoked. Lastly he submitted that the concerned assessee, i.e., BASF AG Germany could have sought refund by filing tax return within

the time allowed. Since no return has been filed within the time allowed, no refund is permissible. He, thus, submits that the petition is liable to be dismissed.

21. The learned counsel for the Revenue also sought to contend that Circular No.790 deals with the procedural aspects as such it should not be treated to have prospective operation.

Consideration :
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22. Having heard rival parties, this petition can be disposed of on a narrow consideration without going to the larger issue raised by the petitioners based on interpretation of Article 265 or 300A of the Constitution. The petitioners vide application dated 6th February, 2000 approached the assessing officer to seek adjustment or refund of the amount of tax deducted at source ("TDS") amounting to Rs.2,73,242/- and relied upon the Circular No.769 issued by the C.B.D.T. in this regard. The said circular had an effect of directing the department, after taking prior approval of Chief Commissioner concerned, to return to the person responsible for deducting the tax at source from payments to the non-resident independent of the provision of the Income Tax Act in the following cases:

(I) after the deposit of tax deducted at source under section 195,

(a) the contract is cancelled and no remittance is required to be made to the foreign collaborator;

(b) the remittance is duly made to the foreign collaborator, but the contract is cancelled and the foreign collaborator returns the remitted amount to the person responsible for deducting tax at source.

(c) the tax deducted at source is found to be in excess of tax deductible for any other reason;

(II) The tax is deducted at source under section 195 and paid in one assessment year and remittance to the foreign collaborator is made and/or returned to the Indian Company following cancellation of the contract in another assessment year.

23. The C.B.D.T. has now issued another Circular No.790 dated 20th April, 2000, revoking earlier Circular No.769 reproduced hereinabove and, allowing refund to the persons deducting tax at source under section 195 only in respect of the following two cases:

(a) the contract is cancelled and no remittance is to the non-resident;

(b) the remittance is duly made to the non-resident, but the contract is cancelled. In such cases, the remitted amount may have been returned to the person responsible for deducting the tax at source.

In the opinion of the C.B.D.T., in the cases mentioned above, income does not accrue to the non-resident and, therefore, the tax deducted belongs to the deductor. It also opined that where no income has accrued to the non-resident due to the cancellation of the contract, the amount deposited to the credit of Government cannot be said to be "tax".

24. The assessing officer vide his order dated 14th July, 2000 rejected the application made by the petitioners for refund of TDS in view of subsequent Circular No.790 dated 20th April, 2000. The said order stands confirmed by the Commissioner of Income-tax vide his order dated 8th January, 2001 passed in revision application filed under section 264 of the Act.

25. In the above view of the matter, the first question which needs consideration is: which of the two circulars would be applicable to the refund application of the petitioners dated 6th February, 2000. Before taking this issue for consideration, it is necessary to first consider whether the circulars issued by the C.B.D.T. can operate with retrospective effect. This Court in the case of **Unit Trust of India v. P.K.Unny** (supra), to which one ofl us (Daga, J.) is a party, observed:

> ".....It is well settled that the withdrawal of circulars cannot operate retrospectively. In that sense, circulars under section 119 do not constitute law. They are in the nature of instructions and/or guide lines. Therefore, the communication dated January 29, 2001, will operate prospectively and not retrospectively...."

26. The Full Bench of the Kerala High Court in **C.I.T. v. B.M.Edward India Sea Foods** (supra) was dealing with the case where the assessee, an individual, was a partner in the firm. He was also a partner in another firm along with his wife. For the assessment year 1971-72, the business of the firm in which the assessee's wife was also a partner ended in a loss. In the assessment for the earlier years, the income of the wife in the firm of which she was a partner was included in the assessee's own income and assessed together under section 64 of the Act. For the assessment year 1971-72, the assessee's claim that the loss incurred by, or debited to, his wife's account, should similarly be set off against his other income, was disallowed by the ITO holding that, under section 64 of the Act, only the "income" of a spouse can be included in the total income, and not loss.

27. On appeal, the AAC held that the expression "income" in section 64 comprehends both

positive and negative aspects of the income and allowed the set-off claimed by the assessee. The department appealed to the Income-tax Appellate Tribunal. Matter was carried to the High Court. The Division Bench of the Kerala High Court noticing two contradictory views of the Bench made a reference to the Full Bench to resolve the conflict.

28. The question which was required to be considered by the Full Bench was: whether on the facts and in the circumstances of the case, the Income-tax Appellate Tribunal was right in law in holding that the instructions contained in the circular of the C.B.D.T. which were in force on the first day of the assessment year will be applicable and the ITO was bound by it, even though he passed the assessment order subsequent to the withdrawal of the said circular. While considering the question referred, the Full Bench held that having regard to the scope, effect and the purpose of the circular involved therein, and in particular considering to the fact that the circular was in force and operation throughout the assessment year 1971-72 and withdrawn only on April 6, 1972, the assessee was entitled to have the assessment made and completed in accordance with the circular, which contained necessary directions as to how the assessment had to be made. It was, thus, held that the Tribunal was

right in law in holding that the instructions contained in the circular of the C.B.D.T., which were in force on the first day of the assessment year, were applicable and the ITO was bound by it even though he passed the assessment order subsequent to the withdrawal of the said circular. A special leave petition filed against this judgment of Full Bench was dismissed by the Supreme Court in on 17th November, 1982 vide **C.I.T. v. Geeva Films** (1983) 140 ITR (St.) 1.

29. In the case of **C.I.T. v. N.T.Ramarao (H.U.F.)** (supra), a question similar to the question which was for consideration before the Kerala High Court fell for consideration. Relying upon the aforesaid judgment of Full Bench of the Kerala High Court and in **C.I.T. v. B.M.Edward India Sea Foods** (supra), the Andhra Pradesh High Court held that the circulars which are in force during the relevant assessment years are the circulars that have to be applied and the subsequent circulars either withdrawing or modifying the earlier circulars have no application.

30. In the above view of the law laid down by Andhra Pradesh High Court in consonance with the law laid down by the Kerala High Court, we have no hesitation to come to the conclusion that the

application moved by the petitioners for refund was liable to be considered in accordance with Circular No.769 issued by the C.B.D.T. as the circumstances for refund referred therein are liable to be held applicable to the facts of the case at hand in its true letter and spirit.

31. Having said so, we need to consider one more contention raised by the Revenue that Circular No.790 dated 20th April, 2000 being procedural one has a retrospective operation; as such said circular will be applicable to the refund application moved by the petitioners. This argument need not detain us. At the first flush, both circulars give an impression that they are procedural but on deeper scrutiny we find that they are not. There is no provision under the Act permitting the deductor to claim refund of the amount of tax deducted at source (TDS). For the first time, this right to claim refund of TDS was given to the deductor by Circular No.769 and subsequently, it was recognised by Circular No.790 issued by the C.B.D.T. Thus, the said circulars created a vested right in favour of the deductor to claim refund of TDS. Therefore, the said circulars cannot be said to be the circulars merely providing for procedure for refund of TDS. In that view of the matter, applying the very same test, the

subsequent circular in question i.e. Circular No.790 dated 20th April, 2000 cannot be said to be merely a procedural one so as to give it retrospective effect. Since the petitioners have been non-suited only on the ground of applicability of the second circular, the said view is no longer sustainable for the reasons recorded hereinabove. In our considered view, this petition is liable to be allowed on this count alone. Refund to the petitioners is liable to be granted applying first circular. So far as other contentions are concerned, they need no consideration for the view taken by us.

32. In the result, impugned orders dated 28th February, 2001 passed by the Commissioner of Income Tax, Mumbai and the order dated 14th July, 2000 passed by the assessing officer rejecting application for refund of TDS are set aside and it is declared that the petitioners are entitled to refund of TDS amount. Petition is allowed. Rule is made absolute in terms of this order with no order as to costs.

(J.P.DEVADHAR, J.) **(V.C.DAGA, J.)**